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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 576

PETER JOSEPH TROIANO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETER JOSEPH TROIANO
Petitioner pro se
96 Bedford Avenue
Brooklyn, New York 11211

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IN THE

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No. .....

PETER JOSEPH TROIANO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Peter Joseph Troiano, *pro se,* prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit made and entered in this case on July 22nd, 1966.

Opinion Below

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra,* was rendered July 22nd, 1966, and is not reported to date.

Jurisdiction

The judgment of the Court of Appeals was entered on July 22nd, 1966 (Appendix B hereto, *infra*). The time for

filing this petition for certiorari has been extended to and including September 20th, 1966 by Associate Justice William J. Brennan, Jr. The jurisdiction of this Court is invoked under Title 28, U. S. C. §1254(1).

Questions Presented

Petitioner, was convicted by the District Court, sitting without a jury, and sentenced to five years imprisonment for knowingly and unlawfully possessing about forty thousand dollars worth of forged and counterfeit four-cent United States postage stamps with the intent to use and sell them in violation of Title 18, §501, United States Code.

1. Whether, under the Fourth Amendment to the United States Constitution, the postage stamps evidence seized in an auto by federal agents after a dual search, without a warrant, was petitioner's constitutional rights violated?

Whether, under the Fourth Amendment to the Constitution of the United States, was petitioner's rights violated when:

a) the federal agents took the Government witness' auto to the laboratory to scientifically examine the counterfeit postage stamps and then replaced the stamps in the auto and after returning the auto to the hotel, waited for hours until petitioner had entered the auto, before placing petitioner under arrest and again seized the counterfeit stamps which were in the trunk of said auto;

b) the federal agents purposely refrained from arresting the Government witness, after their search and seizure and laboratory analysis proved the postage stamps were spurious, until hours later,

when petitioner entered the witness' auto. Can a tainted search and seizure be rehabilitated and purified by the subsequent arrest?

2. Whether, under the Confrontation Clause of the Sixth Amendment to the United States Constitution, petitioner was denied his constitutional right by the Trial Court's denial of petitioner's application for a reasonable continuance of trial to reclarify the important taped recording of the conference between a "special employee", one Government witness and two federal agents which was partly indiscernible.

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statute Involved

Title 18, §501, United States Code provides:

§501 Postage stamps and postal cards

"Whoever forges or counterfeits any postage stamp, or any stamp printed upon any stamped envelope, or any die, plate, or engraving therefor; or

Whoever makes or prints, or knowingly uses or sells, or possesses with intent to use or sell, any such forged or counterfeited postage stamp, stamped envelope, postal card, die, plate, or engraving; or

Whoever makes, or knowingly uses or sells, or possesses with intent to use or sell, any paper bearing the watermark of any stamped envelope, or postal card or any fraudulent imitation thereof; or

Whoever makes or prints, or authorizes to be made or printed, any postage stamp, stamped envelope, or

postal card, of the kind authorized and provided by the Post Office Department, without the special authority and direction of said department; or

Whoever after such postage stamp, stamped envelope, or postal card has been printed, with intent to defraud, deliver the same to any person not authorized by an instrument in writing, duly executed under the hand of the Postmaster General and the seal of the Post Office Department, to receive it—

Shall be fined not more than $500 or imprisoned not more than five years, or both."

Statement of the Case

The superseding one-count indictment is set forth at (3a).* Petitioner was indicted on January 31, 1964 for violating §501, Title 18, U. S. C. Prior thereto, and in the fall of 1961, five men including petitioner, were indicted for the identical crime (35a). On October 10, 1961, at 3:45 A.M. petitioner was arrested in a car belonging to one of the former co-defendants named Costello. Earlier, on the evening of October 9th, 1961, a conference ensued in a room in the Benjamin Franklin Hotel in Philadelphia, between former co-defendant Costello, and "special employee" Blaney and two undercover federal agents, which conference was then recorded by other federal agents. Two tapes were made and one was partly unintelligible (98a-109a).

Petitioner was not in the hotel room wherein the recordings were made. Of the four men in the room one was a "special employee", two were federal undercover agents,

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*Numerals in parentheses followed by letter "a" refer to pages of the printed "Appendix for Appellant" in the Court below; nine extra copies of which have been filed herewith.

and the other person was Costello. All four occupants of the hotel room are on the side of the adversary Government. Costello and Noce, although arrested previously and indicted with petitioner were not indicted with petitioner on the superseding indictment. Costello and Noce entered *nolo contendre* pleas on June 9, 1962 and were placed on five years probation (35a). Costello is Noce's nephew.

Prior to petitioner's trial before District Judge Lord, sitting without a jury, and on June 14, 1965, the Court presided at a hearing on petitioner's motion to suppress the $40,000 worth of counterfeit four-cent stamps found in the trunk of Costello's auto (5a-33a). The Court denied the motion, without opinion, after the motion to suppress hearing was concluded (33a).

The trial commenced immediately. Petitioner waived a jury trial (34a). Agent Jordan had testified at the suppression hearing that a recording was made of the conversations in Room 1221 (21a). After several witnesses were called by the Government the defense was permitted to take the two tapes overnight. The following day, June 15, 1965, petitioner moved the Trial Court for a continuance of trial to permit him an opportunity to transcribe one of the tapes and to have the second tape reclarified (159a). The Trial Judge denied the application for the continuance (159a, 161a). After due defense motions (160a-162a) the Court rendered its verdict of guilty (163a). The sentence was subsequently rendered on October 5th, 1965 (165a-174a) under §4208(b) of Title 18, U. S. C. for imprisonment of the maximum of five years (172a).

Reasons for Granting the Writ

Federal Agent Motto's entry into the trunk of the auto for the alleged purpose of expertizing the million counterfeit postage stamps was illegal. At the outset, the agent took the automobile to the United States Customs House to ascertain the genuineness of the stamps (12a) after the agent met special employee Blaney in the lobby of the hotel and was handed the keys to the 1959 Bonneville sedan which was parked outside the hotel (83a). The agent testified he took the car keys, opened up the trunk and saw five boxes. He opened up one of the boxes and saw it contained a quantity of stamps. He immediately determined that these were counterfeit stamps (84a). Agent Jordan testified that Agent Motto and special employee Blaney took the stamps to the Customs House where it was examined and replaced in the automobile (12a). The auto was returned to the same entrance of the hotel. To prevent movability of the auto, two of the agent's cars sandwiched in the Bonneville car bumper to bumper (13a).

The first search of the auto occurred when special employee Blaney gave the car keys to Agent Motto and both proceeded to the Customs House for further analysis after the agent had opened the trunk of the car at the hotel and removed the evidence prior to petitioner's arrest. Of course, this too, was the first seizure. Instead of arresting petitioner, the agents returned the auto to the original precise spot and waited hours for petitioner to approach and enter the auto before arresting him. The car was again "searched" and the evidence was "seized" anew. The Court of Appeals opinion erroneously imputes consent to petitioner as to the car keys (see A2). It was Costello's car and keys.

This was a warrantless arrest. The search and seizure without a warrant was invalid because it was not within

the incident to arrest exception to the warrant requirement nor within the exception pertaining to movable vehicles. There is no suggestion in the record that the interrogation of petitioner disclosed anything incriminating. The officers knew the contents of the auto when they arrested petitioner. After all, the agents had previously seized the auto and searched it prior to petitioner's arrest. Inasmuch as the auto was in the custody of the agents, bumper to bumper, it could hardly be argued that the car could be quickly moved out of the locality or jurisdiction.

Where the search was for any evidence that would incriminate the person arrested, this Court has consistently held the search and seizure unconstitutional as the type of general search that the Fourth Amendment to the Constitution of the United States was designed to prevent. See, e.g., *Boyd* v. *United States,* 116 U. S. 616, 625-629 (1886); *Weeks* v. *United States,* 232 U. S. 383, 393-394 (1914); *Go-Bart Co.* v. *United States,* 282 U. S. 344, 357 (1931); *United States* v. *Lefkowitz,* 285 U. S. 452, 465 (1932); *Kremen* v. *United States,* 353 U. S. 346 (1957). Cf. *Wong Sun* v. *United States,* 371 U. S. 471, 481 n. 9 (1963); *Preston* v. *United States,* 376 U. S. 364, 367-368 (1964).

This Court has held that the search of a motor car not undertaken until persons who had occupied it had been arrested and taken into custody to a police station and that the auto had been towed to a garage was too remote in time or place to have been incidental to arrest, and therefore the search without a warrant failed to meet the test of reasonableness under the Fourth Amendment. which rendered the evidence obtained as a result thereof inadmissible. (*Preston* v. *United States,* 376 U. S. 364,

supra). The Fourth Amendment forbids two things: illegal search and illegal seizure. The arrest followed:

a) The illegal search and

b) The illegal seizure, and was not contemporaneous with it but was subsequent to it. Such procedure is contrary to the Fourth Amendment.

See, *Mapp* v. *Ohio*, 367 U. S. 643; *Irvine* v. *California*, 347 U. S. 128; *Amos* v. *United States*, 255 U. S. 315; *Miller* v. *United States*, 357 U. S. 301; *Giordanello* v. *United States*, 357 U. S. 480; *Kremen* v. *United States*, 353 U. S. 346, *supra*. The search cannot be justified by what is turned up at the search (*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385). It is apparent that there was no waiver on the part of petitioner to either the previous or subsequent search and seizure, both being separate elements requiring consents (*Boyd* v. *United States*, 116 U. S. 616, *supra; Takahashi* v. *United States*, 143 F. 2d 118 (9th Cir. 1944)).

This Court has not decided a case wherein the police searched and seized a car without a warrant and after discovering incriminating evidence in the trunk of the auto, belonging to a co-defendant, returned the auto to precisely the same place whereat it was taken by the agents, and then awaited its occupancy by petitioner before arresting him and then duplicating the search and seizure.

It is more than irony to note that the Trial Court below has recently granted a motion to suppress evidence when it held that absent evidence that F.B.I. Agents warned a defendant of his right to refuse a warrantless search or that the defendant was aware of his right to do so, the defendant's consent to search, waiving his Fourth Amendment constitutional rights, was not shown to have been intelli-

gent, and the evidence of the bank robbery seized after obtaining such consent was inadmissible (*United States* v. *Blalock* (D. C. E. D. Pa. 1966), 255 F. Supp. 268).

It is undisputed that Agent Jordan of the United States Secret Service made tape recordings of the negotiations which took place in Room 1221 of the hotel (21a). Strangely, although petitioner was not in that room, recordings were made between persons who gravitated to the Government's side after their arrest. One of the tape recordings was unavailable for reclarification purposes despite its incriminatory content against petitioner, in violation of the Fifth Amendment. The defense was surprised at the hearing on the motion to suppress to learn that there were tapes in existence. At the end of the day, the Court allowed petitioner's counsel to take both tapes back to the hotel to listen to them. One tape was partly unintelligible and this conceivably prejudiced petitioner's case for he was unable to develop the fact that it was the Government witnesses who had been the prime movers in this illegal transaction and that petitioner's involvement was one of innocence. In view of the fact that this was not a jury trial, the Trial Court should have exercised a proper discretion by granting a continuance to petitioner for the purpose of transcribing and reclarifying the partially indiscernible tape.

The arrest in the case at bar occurred October, 1961; five defendants were indicted; co-defendants Costello and Noce pled *nolo contendre* in 1962 and were sentenced to probation terms in exchange for their promise to testify against petitioner; hence, since the auto belonged to Costello, the reclarification of the tape was very important to petitioner in order to properly present his defense especially when he just learned of the tapes' existence at the

hearing. The Government could not have been prejudiced by a reasonable continuance of this one-day non-jury trial for such purpose. Petitioner was found guilty that very day.

Costello testified he conducted the negotiations for the sale of the counterfeit stamps. Costello testified he did not know about any counterfeit stamps until he arrived in the room at the hotel (43a, 53a-54a). Costello said he saw the stamps for the first time after he had been arrested (57a). However, the purported buyers had a sheet of the spurious stamps (58a). Where this sample sheet came from remains unexplained. However, as appears from partial tape transcriptions, some light can be shed on the situation. Costello stated that he had never seen the contents of the boxes in the auto (96a). Yet, Costello was recorded electronically as having described the boxes of stamps as having two thousand in a package; one hundred thousand in each wrapper; two wrappers in a box and five boxes (103a). A transcription from the tape shows an admission by Costello "we sent you the samples * * *" (105a). Petitioner was entitled to an opportunity to transcribe and redo the tapes in order to show motive on the part of Costello and Noce, the Government's principal witnesses.

In *Dennis* v. *United States*, 384 U. S. 855, 86 S. Ct. 1840 (1966), this Court reversed the judgment and held that various factors, including the recognition of growing realization that disclosure, rather than suppression of relevant materials, ordinarily promotes the proper administration of criminal justice. The fact that the Government had conceded that the importance of preserving the secrecy of Grand Jury minutes was minimal and had also admitted the persuasiveness of the arguments advanced in favor of disclosure, which fact precluded any allegation that the de-

fense had failed to make out a "particularized need" entitled the defendant to examine the Grand Jury minutes relating to the trial testimony of four Government witnesses while those witnesses were available for cross-examination. Mr. Justice Fortas, speaking for the majority of this Court, said in *Dennis* v. *United States, supra*, at 873 and at 1851:

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." [citing cases]

In light of the fact that this Court has evinced a more liberal view towards disclosure of Grand Jury testimony, the rule should be broadened to include tape recordings in the prosecutor's possession. This is especially so when the need therefor is so great and has prejudiced petitioner.

The initial search and seizure was illegal. The Government bootstrapped the taint by awaiting petitioner's arrest. This Court should exercise its supervisory powers over the administration of criminal justice herein.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

PETER JOSEPH TROIANO
Petitioner pro se

Dated: September 19th, 1966.

APPENDIX A

Opinion of United States Court of Appeals, Third Circuit, Affirming Judgment of Conviction

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15678

UNITED STATES OF AMERICA,

—v.—

PETER JOSEPH TROIANO,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 18, 1966

Before: KALODNER, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 22, 1966)

By HASTIE, *Circuit Judge.*

The district court, sitting without a jury, convicted the appellant Troiano and sentenced him to 5 years' imprisonment for knowingly and unlawfully possessing about one million forged and counterfeit four cent United States postage stamps with the intent to use and sell them in violation of section 501 of title 18, United States Code.

Appendix A

On this appeal we consider first whether the district court erred in admitting the counterfeit stamps in evidence, denying the motion of the accused to suppress this evidence as illegally seized. The relevant chain of events began in New York where, according to the testimony, Troiano induced associates to borrow a car for him so that he could deliver what he described merely as "merchandise" to Philadelphia. Before departing for Philadelphia in the borrowed car, Troiano told associates who accompanied him in another vehicle that the "merchandise" was in the borrowed car. Upon arrival in Philadelphia Troiano and his associates parked their cars on the street and went to a hotel, where they made contact with a hotel guest who purported to be a prospective purchaser of the merchandise but was in fact an agent of the United States Secret Service.

In the negotiations which took place in the hotel during the ensuing evening hours, Troiano and his associates disclosed to the prospective purchaser that the trunk of the car driven by Troiano contained a million dollars worth of counterfeit postage stamps. There was much haggling about price and the prospective purchaser expressed concern about the quality of the stamps and insisted upon seeing them and having them examined by his own expert. Accordingly, Troiano surrendered his car keys which the prospective purchaser's "expert", another Secret Service agent, took to the car. The agent unlocked the trunk, satisfied himself by brief inspection that the merchandise was counterfeit stamps and drove the car to the Customs House a few blocks away where a more careful examination of the stamps was made. He then drove the car, still containing the stamps, back to the hotel and returned the keys.

Somewhat later the negotiations collapsed. About 4 A.M. Troiano left the hotel, entered the car and attempted to start it. He was then arrested by Secret Service agents and the car and the stamps were seized. The car was confiscated and duly forfeited as contraband.

Troiano's objection to the use of the stamps as evidence against him is based upon the fact that, acting without a search warrant, the Secret Service agents obtained entry to the locked car containing the stamps by falsely representing themselves to him as prospective purchasers.

The great concern of the law to protect the privacy of the home and the undisturbed possession of other lawful property may dictate rules which deny effect to consent to enter a residence or invade other private property obtained by trickery or misrepresentations. See *e.g. Fraternal Order of Eagles* v. *United States,* 3d Cir., 1932, 57 F. 2d 93. But the car in this case and the counterfeit stamps in it were not property the ownership or possession of which the law protects. See *Brinegar* v. *United States,* 1949, 338 U. S. 160, 176. Quite to the contrary, both the stamps and the car containing them were contraband, subject as such to seizure without warrant and over the possessor's objection. *Brinegar* v. *United States, supra; Carroll* v. *United States,* 1925, 267 U. S. 132, 149; *Armada* v. *United States,* 5th Cir., 1963, 319 F. 2d 793; *cert. denied* 370 U. S. 906. For by statute "any . . . counterfeit . . . obligation . . . of the United States" is declared a "contraband article". 49 U. S. C. §781(b)(3). And stamps are "obligations of the United States" within the meaning of this statute. 49 U. S. C. §787(f); 18 U. S. C. §8; *United States* v. *Pappas,* 2d Cir., 1943, 134 F. 2d 922; *Errington* v. *Hudspeth,* 10th Cir., 1940, 110 F. 2d 384, *cert. denied* 310 U. S. 638. The statute also directs that "any . . . vehicle . . . which . . .

is being used" to carry any contraband article "shall be seized and forfeited". 49 U. S. C. §782.

True, such seizure must be supported by probable cause to believe the vehicle contains contraband.[1] But the representations and admissions of Troiano and his associates gave the agents the best of reasons for believing that the car contained counterfeit stamps. In these circumstances, Troiano's delivery of the car keys with consent to the opening of the trunk and an examination of its contents simplified the agents' task but was not essential to their right to seize the car and stamps without a search warrant. *Drummond* v. *United States*, 8th Cir., 1965, 350 F. 2d 983; *Sirimarco* v. *United States*, 10th Cir., 1963, 315 F. 2d 699, *cert. denied* 374 U. S. 807; *United States* v. *Haith*, 4th Cir., 1961, 297 F. 2d 65, *cert. denied* 369 U. S. 804. Indeed, as has already been pointed out, the seizure of such contraband is expressly required by statute. 49 U. S. C. §§782, 783. The motion to suppress the counterfeit stamps as evidence was properly denied.

The only other substantial question on this appeal concerns the failure of the court to grant a requested continuance of several days' duration to permit defense counsel to have a certain tape recording processed and transcribed in an effort to clarify portions of the recording that were garbled and unintelligible.

The circumstances were these. Certain of the negotiations in the hotel concerning the sale of stamps were secretly monitored by a government agent and recorded

[1] Although generally the courts discourage searches without warrants, the easy mobility and likelihood of escape which characterize an automobile parked on the public street justify the search of such a vehicle upon adequate probable cause, without delay until a search warrant can be obtained. See *Husty* v. *United States*, 1931, 282 U. S. 694, 701; *United States* v. *Walker*, 4th Cir. 1962, 307 F. 2d 250, 252.

on a tape recorder. On the first day of trial, the prosecutor, who planned to call participants in the recorded negotiations as witnesses, advised defense counsel of the recordings and surrendered the tapes to defense counsel for overnight examination. The following day the defense used some of the recorded statements in cross-examining and attempting to impeach a witness.

However, parts of the recording were indistinct and even unintelligible. Accordingly, defense counsel requested a continuance of several days' duration to permit an effort to process and transcribe the tape in the hope that the blurred portions would become intelligible. The court denied the motion.

We think this action was a proper exercise of discretion. The government had fully disclosed and surrendered to the defense its complete record of what the witnesses had said. The tapes were no less intelligible to the defense than to the prosecution. Nothing appeared that indicated a probability that the garbled portions of the tape could be made intelligible. The defendant merely hoped that the recording could be clarified and that if clarified, it might reveal something useful. Moreover, since the tapes themselves would not have been admissible to prove the truth of any statement thus recorded, and the witnesses whose conversations were recorded were available, it is at least very doubtful whether the defense could have derived any benefit from a clarification of the recording. It is not obligatory that the court suspend the trial to permit the defendant to pursue this unpromising and speculative undertaking.

We find no merit in any of the appellant's other contentions.

The conviction and sentence will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[File Endorsement Omitted]

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,678

UNITED STATES OF AMERICA,

—vs.—

PETER JOSEPH TROIANO,

Appellant.

(D.C. Criminal No. 21627)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 11, 1965, be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

July 22, 1966

[File Endorsement Omitted]

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 576

PETER JOSEPH TROIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A6) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on July 22, 1966. On August 18, 1966, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 20, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

285-307—66

QUESTIONS PRESENTED

1. Whether government agents, having probable cause to believe that an automobile contained contraband, could properly search and seize it.

2. Whether the trial court abused its discretion in refusing to grant a continuance to permit the defendant to transcribe a tape recording.

STATUTES INVOLVED

Section 781 of Title 49 provides in pertinent part:

> (a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
>
> (b) As used in this section, the term "contraband article" means—
>
> * * * * *
>
> (3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security.

Section 782 of Title 49 provides in pertinent part:

> Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited * * *.

STATEMENT

An indictment filed in the United States District Court for the Eastern District of Pennsylvania charged petitioner with knowingly possessing about one million forged and counterfeit four-cent United States postage stamps with intent to use and sell them in violation of 18 U.S.C. 501 (R. 3).[1] He waived trial by jury. He was found guilty and on October 5, 1965, was sentenced to imprisonment for five years under 18 U.S.C. 4208(b) (R. 172). The court of appeals affirmed the conviction.

On October 9, 1961, petitioner and two associates, Joseph Costello and Vincent Noce, came to Philadelphia from New York. Petitioner traveled in a Pontiac automobile which Costello had borrowed from a friend. The others traveled in another automobile. The Pontiac contained about a million dollars in counterfeit stamps. Petitioner parked it near a Philadelphia hotel (R. 38–42, 83) and in the hotel he and his associates attempted to sell stamps to government agents who posed as buyers (R. 43–48). Later, petitioner and Noce remained in one hotel room while Costello went to another room where he negotiated with the pretended purchaser (R. 47, 72–73). One of the agents was given the keys to the Pontiac to enable

[1] The "R." references are to the Appendix for Appellant in the court of appeals.

him to inspect the stamps (R. 49–50, 83, 138–139).

On a motion to suppress evidence it was shown that the government agent who had been given the keys to the car first examined the stamps on the street at about 11 p.m.[2] He drove the Pontiac to the custom house, where government agents conducted a further examination of the stamps. The automobile was then driven back to a place near the hotel and two cars were parked bumper-to-bumper against it so that it could not be moved (R. 12–13, 28, 84–85). Petitioner's arrest occurred at about 3:45 a.m. when he left the hotel and entered the automobile (R. 15). Petitioner contended that the stamps were inadmissible in evidence against him because they had been seized before his arrest.

ARGUMENT

1. The agents had authority to seize the automobile for forfeiture under 49 U.S.C. 782 as soon as they had probable cause to believe that it was being used to transport counterfeit money. Thus, even before the agent was given the keys to the car in order to enable him to examine the stamps, seizure could properly have been effected. *United States* v. *Haith*, 297 F. 2d 65 (C.A. 4), certiorari denied, 369 U.S. 804; *Drummond* v. *United States*, 350 F. 2d 983, 988 (C.A. 8), certiorari denied *sub nom. Castaldi* v. *United States*, 384 U.S. 944; *Burge* v. *United States*, 342 F. 2d 408, 414 (C.A. 9), certiorari denied, 382 U.S. 829; *Sirimarco* v. *United States*, 315 F. 2d 699, 701 (C.A.

[2] Petitioner conceded that the agents could have lawfully seized the car at this time (R. 32).

10), certiorari denied, 374 U.S. 807. The delivery of the keys as part of the criminal scheme merely facilitated the seizure, and the lawful seizure did not become invalid because the agents replaced the stamps in the automobile, returned the car to the vicinity of the hotel, and waited for a driver to appear. Such action violated no rights of petitioner. A legal seizure of the vehicle had already been made; the vehicle had become the property of the United States by forfeiture after the agents positively determined that the stamps were counterfeit.

2. When petitioner and his two companions, Costello and Noce, came to the Philadelphia hotel, they went to a room on the third floor, where they met two other men, Blaney and Martin. While petitioner and Noce remained in the third floor room, Costello and Blaney negotiated for the sale of the stamps with two government undercover agents in a room on the twelfth floor. The negotiations in that room were secretly monitored and recorded on a tape recorder. At the hearing on the motion to suppress, which immediately preceded the commencement of the trial, the fact of monitoring and recording was disclosed (R. 8–9, 21).

At the trial, after Costello had testified on cross-examination that he did not know how the stamps were printed (R. 97), defense counsel offered a portion of the tape recording of his conversation with the agents (R. 98–99). When the judge found the tape unintelligible, defense counsel said that she had been able to take quite lengthy notes (R. 99) and asked for an adjournment so that the whole tape

could be transcribed (R. 100). The court suggested that counsel had demonstrated that she could cross-examine Costello on the basis of her notes, but counsel replied that she wanted to offer the tape as direct evidence (R. 106) and stated that she thought she could get a transcript made in about a week (R. 107). The court ruled that counsel could cross-examine the witness and, if Costello denied any of the statements, play that portion of the tape which contained the statements (R. 108). The court also said that thereafter it would permit the defense to go forward with all portions of its case except the tape and would adjourn the trial to permit the tape to be transcribed (R. 108). However, after Costello had been cross-examined on the basis of the tapes (R. 110–132), and after the defense had put on its case by calling only the agent who was present at the twelfth floor conference,[3] the court declined to adjourn the trial (R. 159–160). The court allowed in evidence the portions of the tape used to attack Costello's credibility (R. 161).

There is no substance to petitioner's complaint that a stenographic transcription of the tapes was necessary in order to prove that "petitioner's involvement was one of innocence" and to show "motive on the part of Costello and Noce" (Pet. 10–11). Noce did not even participate in the conversations that were recorded, and as far as Costello was concerned petitioner was able to use the intelligible

[3] Defense counsel brought out from this witness that the stamps were packed in a manner described by Costello in the conversation (R. 139).

portions of the tapes to cross-examine him as to his knowledge of the stamps in the car. The fact that prior to the trip to Philadelphia Costello might have known that "the merchandise" being transported was counterfeit stamps (R. 43, 55), as petitioner sought to demonstrate, does not show that petitioner was innocent. The district court had indicated its willingness to adjourn the case if the tapes proved to be significant. When, however, it became clear from the defense case that petitioner was seeking merely to reiterate its impeachment of Costello, the judge properly exercised his discretion in declining to grant an adjournment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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IN THE

Supreme Court of the United States

October Term, 1966

No. 576

PETER JOSEPH TROIANO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO OPPOSING BRIEF FOR THE UNITED STATES

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Petitioner has read the Brief for the United States in opposition to his petition for a writ of certiorari. It requires and merits a reply.

At the outset, the Court of Appeals and the Solicitor General each erroneously alluded to the seized car as containing "a million dollars in counterfeit stamps" (See Government's Brief in Opposition, p. 3; Cf. Opinion of Court below, p. "A2" of Petitioner's Appendix to main petition for certiorari). The portion of the discernible tapes involved co-indictee Costello telling the agents that the car contained one million four-cent stamps worth twenty thousand dollars. The search of the auto disclosed

four cartons of stamps in the trunk of the car without space for another carton.

Secondly, a novel question to be decided by this Court appears to present itself from the Government's own assertion in their Opposing Brief, that the first search and seizure of the vehicle, after which time the agents drove to the Customs House, tested the stamps, replaced the stamps and returned the seized auto with its contraband to the hotel area, waited for a driver to appear, was all purportedly legal since the vehicle had become the property of the United States by forthwith forfeiture.

Petitioner has never conceded that the agents could have lawfully seized the car. Petitioner's objection was sustained by the Trial Court in this record (R. 30a).* Petitioner's oral argument before the Trial Court contended that there was no probable cause to immediately arrest him upon entering the car after the agents had confiscated the stamps and car and made the auto and stamps Government property. The dual search and seizure here was illegal. Chaos in the guide lines prescribed in *Mapp* v. *Ohio,* 367 U.S. 643; *Preston* v. *United States,* 376 U.S. 364; *Wong Sun* v. *United States,* 371 U.S. 471; *Draper* v. *United States,* 358 U.S. 307; *Carroll* v. *United States,* 267 U.S. 132 will inevitably result if the Government's position is upheld.

E.g., if the Government would be permitted to search and seize a car without warrant and probable cause, then to have the Government replace the seized contraband and return "the property of the United States" to the area and await a driver whom the agents admit they never saw before, is unreasonable and illegal and its proceeds and arrest should be condemned as inadmissible and illegal.

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* The "R" references are to the Appendix for Appellant in the Court of Appeals, Third Circuit.

The search without a warrant will be sustained where it is made incidental to a lawful arrest and contemporaneous therewith as to time and place. Both conditions must be present. *Preston* v. *United States,* 376 U.S. 364, *supra, Carroll* v. *United States,* 267 U.S. 132, *supra.* The search must be truly incidental to the primary purpose for the arrest and may not be used as an excuse to search for evidence to justify the arrest, *United States* v. *DiRe,* 332 U.S. 581. If truly incidental to a lawful arrest, the search may extend to objects under immediate control of the suspect. *Preston, supra,* 376 U.S. at 367, 84 S. Ct. 881; *Carroll, supra,* 267 U.S. at 158. In keeping with the foregoing principles, it seems clear that the dual searches and seizures of the auto and stamps was not truly "incidental" as to time and place. The fact that the auto and contents was not searched and seized until about eleven P.M. on October 9th, 1961 (R. 7, 12 and 23) at the Customs House, far from the petitioner's place of arrest, and in the further view that the evidence was returned to the hotel area with its replaced contraband the early morning of the following day, October 10, 1961, and considering that petitioner was not arrested until about 3:30 A.M. (R. 6, 9, 15, 23 and 29) when he approached said vehicle, the second search and seizure occurring within at least four hours after the first search and seizure, and far away from the Customs House laboratory, should justify the conclusion that both conditions were not present here as prescribed in *Preston, supra,* and *Carroll, supra.*

The agents testified they were informed by special employee Blaney many hours prior to petitioner's arrival by car in Philadelphia that Costello and Noce were bringing postage stamps via auto to Blaney and the purported buyer. The Government had sufficient opportunity to secure a search warrant, and even the alleged exigencies

of the situation does not excuse this failure. It must be borne in mind that when the agents returned the auto to the hotel area it was sandwiched in "bumper to bumper" in front and behind with two of the agent's cars. This Court reversed a conviction based on the evidence seized at the time of the arrest, and held that a search without a warrant was not justified unless there were "exceptional circumstances" and the exigencies of the situation make that course imperative. *McDonald* v. *United States,* 335 U.S. 451.

Agent Jordan testified that the car in question was locked in "*bumper to bumper* in front and behind to make sure that *it couldn't be moved*" (R. 13, 24). This is not an exigent situation. The agent agreed it would have been "*impossible*" for petitioner *to move* the car (R. 23-24). (Emphasis supplied.) Moreover, the Government now contends in their Opposing Brief that when petitioner entered the auto he was entering the Government's property which had been forfeited to them. Once the car and stamps were deemed by the Government to be their property they had no right to release the contraband in a public area to await a trespasser on their property and to charge petitioner with a crime.

The agents knew that the auto was not petitioner's property. Special Employee Blaney and Government's witness Costello informed the agents it was Costello's car and stamps. The Government contends the car and contents became their property after the initial search. In any event, it wasn't petitioner's property. Costello and Noce made a deal with the Government to testify against petitioner in return for their severance and probation terms notwithstanding their culpability and petitioner's innocence. The Government shifted the prosecution from Costello and

Noce (uncle and nephew) to petitioner. This obviated the necessity of the Government calling Blaney as their witness.

Turning to the denial of a continuance, since the earliest day of this great country, it has been a simple principle founded on fundamental justice and fairness not to hurry a criminal proceeding so as to do injustice to a defendant. As the Court stated in *Rex* v. *Rapp*, Pa., 1 Dall. 9, 1 L. Ed. 7 (Pa. 1764):

> "In all cases whether criminal or civil, a trial shall not be hurried on, so as to do injustice to the defendant. Rex v. D'Eon, 3 Burr. 1513."

The granting of a continuance is a matter within the discretion of the Trial Judge, whether the requests are made before trial, *Nilva* v. *United States*, 352 U.S. 385, 395; or during its course, *Avery* v. *Alabama*, 308 U.S. 444. It was shown that the Trial Judge acted arbitrarily and substantially impaired petitioner's ability to defend himself. This Court should recognize, that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar* v. *Sarafite*, 376 U.S. 575, 589. See also *Avery* v. *Alabama*, *supra* (counsel appointed less than three days before trial). Whether there was an abuse of discretion "must be found in the circumstances present in every case, particulary in the reasons presented to the Trial Judge at the time the request [was] denied." *Ungar* v. *Sarafite*, *supra*, at 589.

The Government concedes that the Trial Court stated (R. 108):

> "The Court: • • • I will *adjourn this trial* and permit you to have the tape transcribed and I will

adjourn the trial until 10 o'clock on the 24th of June." (Emphasis added.)

However, when petitioner renewed the application for the adjournment of the non-jury trial to June 24th, the Court later reversed its original position and denied the motion (R. 159-161). The Trial Court's exercise of discretion can only be tested in the light of the reasons disclosed at the time the motion was *first* entertained and granted. *Ungar* v. *Sarafite, supra,* at 589. The Trial Court's reversal of its original ruling deprived petitioner of the opportunity to exculpate himself by using the adjournment to transcribe the tapes and to subject the agents and Costello to rigorous cross-examination which would have shown not only was petitioner blameless but that the real culprits were Noce and Costello. It would have seriously weakened the Government's proof and petitioner's defense was thereby prejudiced. True, Noce did not participate in the recorded conversations but his relative, Costello, did and they reported to each other regarding the stamp-sale negotiations. The first time the agents laid eyes on petitioner was when they returned the auto and stamps to the street near the hotel and waited for someone to approach the car. Petitioner walked in the direction of the car to await Noce and Costello and as a result stands convicted and sentenced for the Government's illegally acquired and inadmissible evidence.

CONCLUSION

For all of the reasons set forth in the main petition for a writ of certiorari and for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: October 26, 1966.

Respectfully submitted,

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